SENTENCING DISCRETION AND PRE-SENTENCE HEARING UNDER INDIAN CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Sentencing is probably the most crucial stage of the criminal justice system, yet it is rarely theorized in-depth. To a great extent, criminal trials are about showing whether the defendant is guilty or not, but in many cases, the question of what kind of punishment is appropriate is largely left up to the judge's discretion, especially in the Indian legal system where the substantive criminal law normally only indicates maximum limits of punishment. Hence, the role of a pre-sentence hearing gains so much significance. Even though the term "pre-sentence hearing" is not explicitly referred to in the Indian criminal procedural law, the practice is very much part of the trial process and it is considered as a separate stage that comes after the conviction and before the sentence.

This article is a comprehensive study of the concept and importance of a pre-sentence hearing in India. It gives an account of reasons for the pre-sentence hearing, pinpointing its function in reformative justice, keeping punishment proportional, and observing the principles of natural justice.

Moreover, the article deals with the contentious problem of whether consent to a pre-sentence hearing is required or a judge may use his discretion if a hearing is not requested by the accused, pointing out the divergence of judicial opinions on that issue and the Supreme Court's larger bench that awaits this matter for a decision. In addition, it discusses the impact of the judge's personality on the verdict. To better explain the Indian position, a small comparative analysis is done of the different countries' sentencing, e.g., Canada, New Zealand and the United Kingdom.

Finally, the paper advocates the very pressing necessity of clear legislative sentencing guidelines to be drawn up that would ensure consistent, fair and transparent sentencing, at the same time, keeping the individualized justice that the pre-sentence hearing is aimed at intact.

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"If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby."

-Nigel Walker, British Criminologist

One of the foundational stones of a civilized society and a nation state is a well-structured and orderly working criminal justice system, for it is the primary duty of the state to protect the rights of the people who have put their trust and well-being on its hands.[3] An efficient administration of criminal justice essentially comprises of three major components, they are : determining and identifying acts as an crime, deciding if a person is guilty of doing such an criminal act and last but not the least, fixing and imposing an appropriate punishment or sentence for the aforementioned criminal act.[4]

This act of deciding what punishment to give to an offender is sometimes referred to as sentencing. It's a complicated task involving delicate balancing of the needs of the society with the rights of an individual, and judges enjoy a considerable discretion in it. Over the centuries of development of civilization, criminologists have given many theories as to why crime happens, and penologists have devised many theories with various justifications for the kinds of punishments created. However, they all agree that a punishment is the logical follow-up and result of a crime.[5]

While the initial theories were focussed more on either providing a way for revenge to the victims or deterring the criminally inclined, the Indian criminal justice administration, following global traditions have moved to a more balanced approach where not only it considers a punitive approach but which also takes into account the reformative needs of the offender too.[6] This approach helps in changing the outlook of the criminals, to rehabilitate him into a normal life once he is out of prison. The aim is to rehabilitate/ reform the offender so

3 Mitali Agarwal, BEYOND THE PRISON BARS: CONTEMPLATING COMMUNITY SENTENCING IN INDIA, 12 NUJS Law Rev. 119 (2019).
4 Frank Bowman, Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 Univ. Chic. Law Rev. (2010), https://chicagounbound.uchicago.edu/uclrev/vol77/iss1/15.
5 NAMITA WAHI, A STUDY OF REHABILITATIVE PENOLOGY AS ALTERNATIVE THEORY OF PUNISHMENT, 14 Natl. Law Sch. India Rev. (2002), https://repository.nls.ac.in/nlsir/vol14/iss1/7.
6 Id.

that he realises his guilt but not to torment him.

Although most of the criminal procedural law, law of evidence and principles of criminal jurisprudence focus on finding the incidents and happenings of facts in the offence under trial, a pre-sentence hearing allows the judge an opportunity to put reformative theory in action by informing himself of the circumstances behind the offender and mitigating factors.

In this article, we will analyse and understand the concept of a pre-sentence hearing, the legal provisions related to it, what is the standpoint of judiciary on it and also discuss similar concepts which are existing in the law of sentencing in other countries.

1. What is Pre-sentence hearing?

The term pre – sentencing hearing is nowhere to be found in the criminal procedural law of India. However, the act itself finds a place in our criminal trial process. It refers to the hearing granted by the trial court to an accused before the final verdict of the case is delivered. As is apparent from the name, it is the hearing given to an accused before passing the sentence for his crime.

To elaborate further, pre-sentence hearing is that stage in trial of an offence in which the guilt of the accused is already proved and the judge has to decide the exact type, nature and quantum of punishment which the accused should undergo for committing that offence.

It is at this stage where the court considers the question of how much sentence should be imposed on the offender. The Indian penal law usually only prescribes an upper limits of punishment in the form of maximum sentence that can be imposed. The lack of a minimum sentence in most of the cases, grants a judge significant discretion in the deciding the quantum or the amount of sentence.

It is at the stage of pre-sentence hearing, after the guilt of accused has been decided, the offender is allowed to make his argument regarding the amount of sentence which will be imposed. The offender can argue and ask for the Court to show leniency and not to go with the maximum sentence possible.

In short, after the accused has been held guilty by the court, a pre-sentence hearing allows the accused to argue for a lesser degree or quantum of sentence to be awarded.

2. Why Pre-sentence hearing?

Considering in isolation, the concept of pre-sentence hearing may appear to be complicated step, that only causes even more delay in completing a trial which is already lengthy and elaborate.

However, pre-sentence hearing achieves many significant objectives and purposes.

The Indian criminal law gives a large amount of discretion to judges in deciding the sentence. Vast majority of substantive criminal law, only prescribes a maximum sentence for any given offence, leaving the job fixing the specifics of a punishment to be imposed on the courts itself. This discretion though vast, is important for the purpose of implementing a fair and just sentencing policy.

Sentencing is one of the important stages in any given justice administration system. It becomes more so in the Indian scenario, because a number of accused belonging from underprivileged sections of the society are unable to find quality legal representation and if the sentencing is not rational or appropriate then there are chances that the constitutional objectives of fairness and justice are not achieved.[7]

It would further also ruin any chances of reformative procedures to have any meaningful impact and reform an offender. For instance, if a watch thief who is a first time offender is made to undergo imprisonment of 3 years then it is possible that any chance of him being able to regain a normal life after coming out of jail is snatched from him, as keeping him in jail for a long duration will not help him to reform his mentality as well as he might lose trust in the justice system

In *Bachan Singh*[8], in the context of death penalty cases, the Hon'ble Supreme Court had observed that the while all the circumstances which are aggravating to the case of the offender are bought before the court during the trial, there are no practical and reasonable opportunities for the offender to put forth any mitigating circumstances and factors during the trial. This arrangement is highly to offender's disadvantage.

7 Manoj v. State of M.P., 2023 2 SCC 353
8 Bachan Singh v. State of Punjab, 1981 (1) SCR 145

The above observation stands true not only for cases of death penalty but also for other cases too. The prosecution in any trial focusses mostly on the facts and circumstances of the offence itself. Very little attention is paid to the offender himself, and if it happens, it only happens when it supports the arguments of the prosecution.

Therefore, a proper use of discretion during sentencing is inexcusable. Such proper use requires a judge to account for many factors such as deterrent value of the punishment, the scope, prospects and possibility of an offender being rehabilitated, which is again judged by various factors like the age, social background, economic condition, emotional and mental health, educational and personal life, existence or absence of any criminal background, etc.[9]

Pre-sentence hearing allows for a more humane treatment of offender. It mandates the adherence to principles of natural justice in criminal law system by allowing the offender to submit for consideration of the court, those situations and circumstances which allow the court to form a more comprehensive opinion and could actually act as mitigating factors.[10]

3. Pre- Sentence hearing in the newly enacted Criminal laws

There are various provisions in *Bharatiya Nyaya Sanhita, 2023* (BNS), and *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS) which relates to pre- sentence hearing. Provisions relating to this are both express as well as implied.

Implied provision: BNS gives discretionary power to judges to decide as to the quantum of punishment or imprisonment that offender must undergo, although, the minimum & maximum imprisonment/ fine is already provided, or you can say the limits is defined by the Sanhita.

For example, under *Section 331(5)* of the BNS, the punishment for the offence of house breaking at night to commit theft is imprisonment up to 14 years. Hence, we can say that the discretion of the judge to decide the number of years of imprisonment is implied in the BNS.

Express Provisions: *Section 258(2)* of BNSS states that in case of a trial before a Sessions Court *"if the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of probation, hear the accused on the question of sentence, & then pass sentence on*

9 Rajesh Kumar v. State through Govt. of N.C.T of Delhi, AIR 2011 SC (CRIMINAL) 2268
10 Id.

him according to law."

Also, *Section 271(2)* of BNSS provides that in trial of warrant cases by magistrate, if the magistrate finds the accused guilty and does not go ahead with the provisions of probation, he shall pass sentence upon the accused after hearing him on the question of sentence.

4. Judicial view on Pre- Sentence hearing

The method by which a judge should decide the quantum of punishment for any given case before the court, and the factors which should be given weightage to arrive at the conclusion, is a highly significant aspect of pre-sentence hearing.

The Supreme Court of India has in its numerous authoritative judgements attempted to elaborately lay down the guiding principles and roadmap for trial court judges to assist them in upholding the ideals of justice and fairness in their sentencing.

The Supreme Court in *Gurumukh Singh's case*[11] (2009), has laid down that there are numerous factors which should be taken into consideration while deciding the appropriate sentence of an accused and these factors differ from one case to another. However, the Court laid down certain relevant factors which are stated below-

i. Reason for committing the crime and relation between the parties,

ii. Whether the crime took place in spur of the moment,

iii. The state of mind of accused while committing the crime,

iv. If the death occurred instantly or after a few days,

v. The kind of injury inflicted,

vi. Accused's age and physical health,

vii. Whether victim was hurt in a fight without previous planning,

11 Gurumukh Singh v. State of Haryana, AIR 2009 SC (SUPP) 2922

viii. What kind of weapon was used & the force used for causing hurt,

ix. The criminal antecedents & personal history of the accused,

x. Whether the death of victim occurred due to injury or due to sudden shock,

xi. The conduct & behaviour of offender after the commission of crime. Whether he had taken the victim to the hospital immediately.

The court also clarified that the above factors are only illustrative & not exhaustive.

In this case while applying the above principles, the Court converted the conviction of appellant Gurumukh Singh from section 302 IPC (punishment for murder) to Section 304 IPC (punishment for culpable homicide not amounting to murder) and sentenced him to rigorous imprisonment for 7 years as opposed to life imprisonment given by Trial Court and approved by the High Court. The reasoning given by the Court was that there was no pre- planning, the incident happened in spur of the moment, there was no previous enmity between the parties and the appellant gave only a single lathi blow to the deceased.

In *Sunita Devi's* case (1976)[12], the Supreme court observed that there is an urgent need for a study of sentencing policy, which should focus on the reformatory aspect with maintaining balance between various categories/ groups.

In *Manoj v. State of M.P.* (2023)[13], the court gave certain guidelines to collect the mitigating circumstances of the accused which are discussed below:

a. Information must be elicited from both the accused and the State by the Trial Court.

b. Accused's psychiatric & psychological assessment which will help in ascertaining the state of mind of accused while committing the crime and will also assist in evaluating the reformation that accused has achieved during the detention period in jail.

c. State must collect additional information relating to accused like:

12 Sunita Devi v. State of Bihar, AIR 1976 SC 2386
13 Manoj, Supra. Note 7

- Age
- Early and present family background
- Education level, income and employment type
- Socio-economic backdrop
- Criminal antecedents
- Other factors such as any history of unstable social activities or mental illness, etc.

d. Information regarding the accused's jail conduct & behaviour, work done, activities the accused has involved himself in, other related details should be called for in the form of a report from the authorities like Probation & Welfare Officer, Superintendent of Jail, etc.

e. Details should also be demanded from Jail Superintendent and Probation & Welfare Officer regarding the overall conduct/behaviour of the accused while he was in jail and also the kind of activities/work in which he was engaged.

4.1 The Infamous Ranga Billa Case:

In the Ranga Billa case[14], the two accused Ranga & Billa committed gruesome murder of two navy kids Geeta and Sanjay Chopra in August 1978. They kidnapped the kids in their car in guise of giving them lift & then raped the girl child & killed both just to satiate their own greed & lust.

The Supreme Court while dismissing the accused's appeal for reducing the death sentence to life imprisonment observed that :

> *"We have not the slightest doubt that the death of the Chopra children was caused by the petitioner and his companion Billa after a savage planning which bears a professional stamp. The murder was most certainly not committed on the spur of the moment as a result*

14 Kuljeet Singh @ Ranga v. Union of India, AIR1981 SC 1572

of some irresistible impulse which can be said to have overtaken the accused at the crucial moment……. Their inhumanity defies all belief and description".[15]

5. Pre- Sentence hearing: Mandatory or Discretionary?

In any given system existence of law does not automatically guarantee that it's followed. Therefore, it is important to discuss the consequences which will follow the provisions of pre-sentence hearing are not complied with or followed in a trial.

If we examine the applicable statutory provisions, the provision as contained in Sections 258(2) and 271 of BNSS, 2023 uses the word "shall". While, it is popularly believed that use of "shall" makes a statutory provision mandatory, however it has been held by Indian courts that only using the word is not the ultimate test of mandatory nature, and nature of the statute, the purported objective, alongwith the context of the provision, all play a key role in such determinations.[16]

If we analyse the opinion of the Higher Judiciary on this question, we find that the opinions as to the question of mandatory nature of pre-sentence hearings are much divided and lacks uniformity.

In the case of *Santa Singh's case* (1976)[17], Bhagwati J. held that non- compliance with the requirement of Section 235(2) of Cr.P.C. (now *Section 258(2)* of BNSS) cannot be termed as mere irregularity which can be curated under *Section 465* of Cr.P.C. (now *Section 511* of BNSS). He further held that, non-compliance of *Section 235(2)* Cr.P.C. goes into the root of the matter and amounts to skipping a very crucial stage of the trial which could vitiate the whole proceedings. And when this kind of illegality occurs, the case should be remanded back & the accused should again be heard on the question of sentencing.

In *Bachan Singh's case* (1981)[18], the apex court held that Section 258(2) of BNSS provides for a divided trial and also the accused has got a right of pre-sentence hearing, whereby he can submit evidence not only related to the crime but might also influence the kind and amount of

15 Id.
16 Muhammed Farooque KT, Statutory Interpretation: Distinguishing Mandatory From Directory Provisions, (Oct. 15, 2025), https://www.livelaw.in/articles/supreme-court-judgment-lifestyle-equities-vs-amazon-technologies-analysis-307014.
17 Santa Singh v. State of Punjab, AIR 1976 SC 2386
18 Bachan Singh, Supra. Note 8

punishment that he may be awarded. The Judge while deciding the punishment should give due consideration not only to the circumstances in which the crime was committed but also to the offender's overall background.

In *Muniappan's case* (1981)[19], the supreme court held that section 258(2) of BNSS is not a mere formality which could be completed by asking a question from the accused, but the judge should try to elicit information from the accused.

In *Dagdu's case* (1977)[20], the Supreme Court rejected the interpretation of *Santa Singh's case* that the failure to hear a convicted person on question of sentence would essentially need remanding the case back to the trial court. Instead, it held that such an omission could be rectified by the higher court by giving an opportunity of hearing to the accused on the question of sentence.

In a recent case[21] of 2022, the Apex Court took *suo-motu* cognizance as the judgments were divided the question as to whether it is mandatory for a judge to hold a separate pre-sentence hearing once a person is convicted for an offence of death sentence. The court opined that while majority of the previous judgements provided that a pre-sentence hearing should me "meaningful, real and effective", there was a lack of clarity on how to achieve this objective, and what does the term "sufficient time" actually pertains to.[22] The court has referred this case to a larger bench for decision and now it is pending before the larger bench.

In Conclusion, we can say safely say that pre-sentence hearing is a mandatory stage of trial, and it cannot be done away with.

6. Judges' role in awarding sentence:

A Judge's personality plays a vital role while deciding the quantum of punishment. Therefore, it is important that not only the judges are free from any political influence, they should also

19 Muniappan v. State of Tamil Nadu, (1981) 3 SCC 11
20 Dagdu v. State of Maharashtra, (1977) 3 SCC 68
21 In Re: Framing Guideline Regarding potential mitigating circumstances to be considered while imposing death sentences, 2022 INSC 987
22 Guidelines on Mitigating Factors in Death Penalty Sentences, Supreme Court Observer, https://www.scobserver.in/cases/guidelines-on-mitigating-factors-in-death-penalty-sentences-in-re-framing-guidelines-regarding-potential-mitigating-circumstances-to-be-considered-while-imposing-death-sentences/ (last visited Dec. 16, 2025).

be able to separate their individual and personal feelings and opinions about the case and to strictly adhere to the facts proven for deciding a case.

The process of judges' appointment plays a very crucial role. For example, in USA, nature of political offices of judges might affect their judgment as they can easily fall prey to the popular opinion.

In *Sunita Devi's case* (2024)[23], the court on the subject of role of a Judges' personality in awarding sentence has observed as below-

> *"32. A decision of a Judge in sentencing, would vary from person to person. This will also vary from stage to stage. It is controlled by the mind. The environment and the upbringing of a Judge would become the ultimate arbiter in deciding the sentence. A Judge from an affluent background might have a different mindset as against a Judge from a humble one. A female Judge might look at it differently, when compared to her male counterpart. An Appellate Court might tinker with the sentence due to its experience, and the external factors like institutional constraints might come into play. Certainly, there is a crying need for a clear sentencing policy, which should never be judge centric as the society has to know the basis of a sentence."*

In the process of sentencing, it may be difficult for a judge to ignore his personal biases and experiences, and complete ignorance of emotions might create more problems than it would solve given the human centric focus of reformative justice, however, a judge must strive to be as objective as possible.

7. Sentencing Policy in other countries

A. Cananda

Various mitigating factors like the kind/ nature of offence, who was the victim, the relation between the accuse & the victim, reason behind commission of crime, etc. is collected. A report may also be obtained by the Probation Officer for assisting the court in awarding sentence or in deciding whether the accused should be discharged.

23 Sunita Devi v. The State of Bihar, 2024 INSC 448

B. New Zealand

According to the Sentencing Act, 2002 the court should take account of certain facts like the gravity of the offence, the effect of offence on the victim, the offender's family and cultural background, etc.

C. United Kingdom

The Coroners & Justice Act, 2009 establishes a Sentencing Council for England and Wales. The Council sets the sentencing guidelines, monitor the operation and effect of its sentencing guidelines. A "pre- sentence report" is submitted by officer to assist the court in determining the most suitable method of dealing with an offender.

8. Conclusion & Suggestions

Pre- sentence hearing is a very important stage in a criminal trial where the accused can present some personal facts about himself which might not be relevant to the case and the rules of evidence generally do not apply at this stage. This hearing helps the judges to give punishment proportionate to the crime committed. The judges should not just see it as a formality. The judges should give proper thought before awarding a sentence and it shouldn't be done in a mechanical manner.

From the above discussion it is clear that there are principles of sentencing which are developed by the judiciary alone. There are no legislative guidelines/ principles that govern the judges' discretion. This lack of sentencing policy results in disparity in sentencing of cases, caused by improper consideration of irrelevant materials and allowing of prejudices to affect the decision making. The judiciary has tried to fill the legislative gaps by laying down guidelines and mandatory directions for collection of pre-sentence reports, but for actually effective and fair sentencing, which not only focusses on punishment but is also allows for a maximum possible scope of reformation where possible, an complete statutory and institutional mechanism is needed. Hence, there is an urgent need to develop legislative guidelines so that the sentencing policy does not differ from one case to another.